70 - 323

in the Supreme Court of the United States

Supreme Court, U.S.
FILED
JUN 23 1971
E. ROBERT SEAVER, CLERK

_____ Term, 1971

NO. [redacted]

KENDALL HOUSE APARTMENTS, INC.,
a Florida Corporation,

Petitioner,

vs.

THE DEPARTMENT OF REVENUE, an agency of the State of Florida, consisting of CLAUDE R. KIRK, JR., as Governor of the State of Florida; EARL FAIRCLOTH, as Attorney General of the State of Florida; BROWARD WILLIAMS, as Treasurer and Insurance Commissioner of the State of Florida; FRED O. DICKINSON, JR., as Comptroller of the State of Florida; TOM ADAMS, as Secretary of State of the State of Florida; FLOYD T. CHRISTIAN, as Commissioner of Education of the State of Florida; and DOYLE CONNER, as Commissioner of Agriculture of the State of Florida,

Respondents.

PETITION FOR WRIT OF CERTIORARI

RALPH H. BEARDEN, JR.,
ATTORNEY, P.A.
648 S.W. 12 Avenue
Miami, Florida 33130
Attorney for Petitioner

MIAMI REVIEW — 371-4853 — 377-3721

INDEX

	Page
Opinion of The Court Below	2
Statement of The Grounds on Which The Judisdiction of This Court Is Invoked	2
Questions Presented For Review	4
Constitutional Provisions and Statutes Which The Case Involves	5
Statement of The Case	5
Stage In The Proceedings At Which The Federal Question Sought To Be Reviewed Was Raised	8
Argument	9
Conclusion	15
Certificate of Service	18

TABLE OF AUTHORITIES

Case	Page
Bailey vs. Alabama, 219 U.S. 219, 233, et seq. 55 L.Ed. 191, 198, 31 Sup. Ct. Rep. 145	11
Devore vs. Lee, (Fla. 1947) 30 2d 924 at 927	13
Garner vs. State Tax Commission, 378 P.2d 619	14
Jenkins vs. City Ice & Fuel Co., 160 So. 215, at 218	13
Londoner vs. Denver, 210 U.S. 373, 52 L.Ed. 1103 28 Sup. Ct. Rep. 708	9, 11
Manley vs. Georgia, 73 L.Ed. 575, at 578	11

STATUTES

Section 201.02, Florida Statutes	5

OTHER AUTHORITIES

1 A.L.I. Restatement, Contracts Sec. 79	14
1 A.L.I. Restatement, Contracts Sec. 83	14

in the

Supreme Court

of the

United States

_____ Term, 1971

NO. _____

KENDALL HOUSE APARTMENTS, INC.,
a Florida Corporation,

Petitioner,

vs.

THE DEPARTMENT OF REVENUE, an agency of the State of Florida, consisting of CLAUDE R. KIRK, JR., as Governor of the State of Florida; EARL FAIRCLOTH, as Attorney General of the State of Florida; BROWARD WILLIAMS, as Treasurer and Insurance Commissioner of the State of Florida; FRED O. DICKINSON, JR., as Comptroller of the State of Florida; TOM ADAMS, as Secretary of State of the State of Florida; FLOYD T. CHRISTIAN, as Commissioner of Education of the State of Florida; and DOYLE CONNER, as Commissioner of Agriculture of the State of Florida,

Respondents.

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

COMES NOW KENDALL HOUSE CORPORATION, by its attorney, and petitions for a writ of certiorari to review a judgment of the Supreme Court of Florida made and entered by said Court on the 29th day of March, 1971, a copy of which is hereto appended, respectfully shows to this Honorable Court:

OPINION OF THE COURT BELOW

This was a case of original jurisdiction in the Supreme Court of Florida. The opinion rendered by the Court on February 24, 1971, the petition for rehearing, and the order of March 29, 1971, denying a petition for rehearing are annexed to this petition as Appendix A, Appendix B and Appendix C, respectively.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The date of the judgment or decree sought to be reviewed is March 29, 1971, denying a petition for rehearing.

The case is one involving the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

The statutory provision believed to confer jurisdiction upon this Court to review the judgment of the Supreme Court of Florida is United States Code, Title 28, Section 1257(3).

Florida imposes by statute a documentary tax on deeds, the amount of which is based on the "consideration" for the conveyance and imposed against the seller. For thirty years after enactment of the tax, the amount of mortgages to which the conveyance was subject were excluded from the taxable "consideration" when the mortgages were not assumed by the buyer. In the case sub judice, the Department of Revenue without legislative authority arbitrarily included as "consideration" the full amount of an outstanding mortgage on the realty conveyed by petitioner notwithstanding that it is expressly not assumed by the purchaser and the seller, the petitioner, remains fully liable thereon. Petitioner was not afforded and is not afforded by Florida Law any hearing on the amount of the assessment prior to the imposing and collection thereof. The Supreme Court of Florida, in this case of original jurisdiction, approved the actions of the Department of Revenue and ruled that it will be conclusively presumed that the full amount of a non-assumed mortgage is "consideration" for the conveyance and fully taxable as such.

Said the Court:

> "It is an economic fact that persons who acquire property 'subject to' a mortgage *normally* pay the indebtedness represented by the mortgage in order to prevent the loss of the property to the same extent as those persons acquiring property 'assuming and agreeing to pay' the mortgage." (Emphasis Supplied)

Thus, the Supreme Court approved the imposition of a tax on a speculative consideration, with no remedy to the taxpayer by which he could recover the tax paid for a mortgage which he is subsequently obliged to pay.

QUESTIONS PRESENTED FOR REVIEW

I

WHEN A TAX IS LEGISLATIVELY IMPOSED, BUT THE AMOUNT THEREOF IS LEFT TO BE FIXED ADMINISTRATIVELY IN A QUASI-JUDICIAL FUNCTION, IS THE TAXPAYER ENTITLED TO BE HEARD ON THE FIXING OF THE AMOUNT?

II

DOES A CONCLUSIVE PRESUMPTION, OR A PRESUMPTION THAT OPERATES TO DENY A FAIR OPPORTUNITY TO REPEL IT, BY WHICH THE AMOUNT OF A TAX IS IMPOSED, VIOLATE THE DUE PROCESS CLAUSE?

III

DOES THE IMPOSITION OF A TAX, THE AMOUNT OF WHICH IS DETERMINED BY SPECULATION AS TO THE VALUE OF AN UNCERTAIN CONSIDERATION, WITHOUT OPPORTUNITY FOR REHEARING OR REDRESS, DENY THE TAXPAYER DUE PROCESS AND EQUAL PROTECTION?

CONSTITUTIONAL PROVISIONS AND STATUTES WHICH THE CASE INVOLVES

Article XIV, Constitution of the United States (Equal Protection Clause and Due Process Clause).

Section 201.02, Florida Statutes:

"201.02 Tax on deeds and other instruments relating to lands, etc.

"On deeds, instruments, or writings, whereby any lands, tenements, or other realty, or any interest therein, shall be granted, assigned, transferred, or otherwise conveyed to or vested in the purchaser, or any other person by his direction, on each one hundred dollars of the consideration therefor the tax shall be twenty cents; provided, that when the full amount of the consideration for the execution, assignment, transfer, or conveyance, is not shown in the face of such deed, instrument, document, or writing, then in such event the tax shall be at the rate of twenty cents for each one hundred dollars, or fractional part thereof, of the consideration therefor."

STATEMENT OF THE CASE

This was an original proceeding in mandamus in the Supreme Court of Florida. The issue was the legality of the action by the Florida Tax Officers compelling the payment of additional documentary stamp taxes.

No testimony was taken, the facts being stipulated as set forth in the alternative writ which issued with consent of respondents. (See Appendix D.)

Petitioner sold two apartment houses receiving $650,000.00 in cash as full consideration for his equity, and conveying the property subject to outstanding non-purchase money mortgages of $493,705.00. Buyer did not "assume" either mortgage, and expressly contracted against liability for the same. Petitioner-seller continued liable to pay said mortgages in the event payments were not voluntarily made by the buyer to protect the conveyed realty from a foreclosure based on default on the mortgage payments. Petitioner-seller alone was liable for any deficiency from such foreclosure.

Petitioner paid the documentary tax on the $650,000.00 cash payment, but did *not* pay such tax on either of the mortgages to which the property was subject and which buyer did not assume nor agree to pay. This action it took in reliance upon two opinions of the Attorney General of Florida (copies attached as Appendices E and F), and 30 years of the tax collection by the State of Florida immediately following enactment of the statute and prior to a third opinion by the Attorney General.

But the taxing officers demanded (and the petitioner was forced to pay) documentary tax on one $493,705.00 mortgage which the buyer did *not* assume, and the petitioner remains liable for the tax on the second mortgage, collection of which is deferred by stipulation of the parties to await the outcome of this petition. The revenue officers imposed the additional tax pursuant to still another opinion (the third one on this point, attached as Appendix G) of

the then Attorney General, expressly overruling the two opinions of his predecessors, and overriding the practice of some thirty years in Florida. There was no change in the statutory law of Florida on this subject since July 29, 1931, when the documentary tax was first levied. Nevertheless the last opinion of the Attorney General was that the amount of "subject to" mortgages would be *presumed* included in the consideration for the conveyance and taxed as such. This was implemented by formal instructions of the State Comptroller to the circuit clerks to the effect that such presumption would be conclusive and the tax imposed accordingly. (Please see Appendix J.)

Florida Statutes, Section 201.12 provides that the Circuit Clerk to whom conveyances are presented for recording shall report to the Department of Revenue anyone failing to affix the required amount of stamps evidencing payment of the tax. To perform this duty, the Clerk must calculate and fix the amount of the tax, based on his calculation of the "consideration" for the convenance.

Florida Statutes, Section 201.11, vests in the Department of Revenue administrative authority to enforce the tax. Accordingly, the directive of the Comptroller to the clerks compels them to treat, for purposes of collecting the tax, all "subject to" mortgages as part of the taxable consideration.

No provision is made by statute or otherwise for any hearing to determine the amount of the "consideration" unless, arguendo, the declaration of the taxpayer to the clerk at time of recording is considered a hearing. Even if it be so considered, due process is still not afforded because of the conclusive presumption in the directive of the Comp-

troller, which the clerk is bound to enforce, and which the taxpayer is not permitted to repel.

The Supreme Court of Florida, in discharging the alternative writ, has held, in effect, that the amount of the "subject to" mortgage will be *conclusively* presumed to be consideration for the conveyance saying, "persons who acquire property 'subject to' a mortgage normally pay the indebtedness represented by the mortgage in order to prevent the loss of the property to the same extent as those persons acquiring property 'assuming and agreeing to pay' the mortgage."

This ruling denies petitioner due process by assessing a tax without a hearing, based upon a conclusive presumption which he is not allowed to repel. Moreover, it denies due process and equal protection by assessment of a tax based on speculation.

STAGE IN THE PROCEEDINGS AT WHICH THE FEDERAL QUESTION SOUGHT TO BE REVIEWED WAS RAISED

This cause was commenced in the Supreme Court of Florida by application for writ of mandamus to the Florida Department of Revenue, et al. Under Florida Statutes, the Supreme Court of that state had original jurisdiction.

The question of due process and equal protection was inherently involved and raised by the relief sought in the application for writ of mandamus, and the petition for rehearing assigned the following grounds:

"3. For that it is a denial of due process, in contravention of the Constitutions of the State of Florida and the United States to deprive relator of property by means of a tax based on speculation.

"4. For that it is a denial of equal protection of the law in contravention of the Constitutions of the State of Florida and the United States to compel relator to pay a tax based on a speculative consideration.

"5. For that it is violative of the equal protection clause of Article XIV of the United States Constitution and the equal protection clause of Article 1, Section 2, of the Constitution of the State of Florida to treat a 'subject to mortgage' the same as a 'mortgage assumed' for purposes of taxation."

ARGUMENT

The Florida Legislature has provided by statute for a tax on conveyances of realty and fixed the *rate* thereof: Florida Statutes, Section 201.02, supra.

However, the assessment, or determination of the amount of the tax requires a determination by the Circuit Clerk, acting as tax collector, of the *value* of the consideration for the conveyance.

This Court said, in *Londoner vs. Denver*, 210 U.S. 373, 52 L.Ed. 1103 28 Sup.Ct.Rep. 708:

> "But where the legislature of a state, instead of fixing the tax itself, commits to some subordinate body the duty of determining whether, in what amount, and upon whom it shall be levied, and of making its assessment and apportionment, due process of law requires that, at some state of the proceedings, *before the tax becomes irrevocably fixed*, the taxpayer shall have an opportunity to be heard, of which he must have notice, either personal, by publication, or by a law fixing the time and place * of the hearing." (Emphasis supplied)

We do not contend, where the legislature has fixed the rate of tax, and all remaining to be done is the mere mathematical calculation of the same, that a hearing thereon would be necessary. However when, as here, the determination of the amount of the taxable consideration is a quasi-judicial function requiring the exercise of judgment, then due process requires a hearing thereon.

Should the "subject to" mortgage be *presumed* consideration for the conveyance, as the Attorney General ruled in his last opinion, then that presumption would be rebuttable and the taxpayer would be entitled to the opportunity to repel it.

The petitioner was denied any such hearing. No provision is made by statute for any opportunity to repel the presumption, nor to be heard on the true value of the alleged "consideration". (Petitioner was compelled to pay the tax on one of the two mortgages involved, and it is only because of stipulation between the parties that payment in the amount of the other is not required pending the outcome of this cause.)

As was declared in *Londoner vs. Denver, supra,* denial of a hearing in such an assessment rendered the assessment void.

But the comptroller insists, and the Supreme Court of Florida holds, that the "subject to" mortgage is conclusively presumed to be consideration for the conveyance. Such a construction, we insist, is violative of the basic tenet of due process.

As this Court said, in *Manley vs. Georgia,* 73 L.Ed. 575, at 578:

> "A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the 14th Amendment. *Bailey vs. Alabama,* 219 U.S. 219, 233, et seq. 55 L.Ed. 191, 198, 31 Sup.Ct.Rep. 145."

Assuming, arguendo, that the seller might expect to derive some benefit from payment by the purchaser on the "subject to" mortgage, it is totally unrealistic to treat the amount of that indebtedness as if the buyer had expressly assumed it. The liability of the seller under the note and mortgage continues, and he alone is responsible for any deficiency. Surely it is an abuse of discretion to treat such an encumbrance for tax purposes as if the amount thereof had been wholly paid in cash to the seller. In each and every foreclosure subsequently developing the seller has been overcharged, without recourse to recoup his loss.

Due process requires that the determination of taxable consideration be made realistically and fairly, and not speculatively nor capriciously.

The Florida Supreme Court said "persons who acquire property 'subject to' a mortgage normally pay the indebtedness represented by the mortgage."

This observation is not supported by anything in the record, and if it is a proper subject for judicial notice, it completely ignores the many foreclosures and abandonments brought on by recessions, changes in economic fortunes and otherwise. More important, it ignores the fact that Florida does not permit the seller to recover taxes paid by him based on the amount of the mortgage if and when the seller is subsequently obliged to pay the mortgage himself for whatever reason.

Application of the tax to the amount of the mortgage as if the seller were completely relieved of his obligation thereunder completely ignores the fact that the buyer is not legally required to pay the mortgage and that the liability of the seller has not been diminished as a matter of contract.

The Supreme Court of Florida noted that after the conveyance the buyer had, in fact, made payments in reduction of the mortgage. These voluntary payments, however, could not have been compelled by the seller and were nonexistant when the tax was imposed. That Court has previously held that when taxes are to be levied according to a monetary consideration, the law contemplates that such tax should be confined to such considerations which have a reasonable *determinable* pecuniary value *at the time of the conveyance*, and not merely prospective.

In *Devore vs. Lee* (Fla. 1947) 30 2d 924, at 927, that Court said:

> "It is an accepted statutory construction principle that laws imposing taxes should be liberally construed for the taxpayers. Section 201.02 F.S.A., imposed a tax of 10 cents on 'each one hundred dollars * * * of the consideration therefor.'
>
> "It appears from the terms of the leases here involved that the considerations passing to the lessors were the lessee's promises in future to pay rent a future payment for a future use. Rent to be paid in the future under circumstances here is not a debt until it becomes either due or owing; and when the leases were executed no rent was either due or owing.
>
> "When taxes are to be levied according to a monetary consideration, the law contemplates that such tax should be confined to considerations which have a reasonably determinable pecuniary value. The sole considerations passing to the lessors for the leases were executory promises for executory considerations. Such leases were not taxable under Sec. 201.02, F.S.A. and F.S. 1941."

The Supreme Court of Florida has also held, in *Jenkins vs. City Ice & Fuel Co.*, 160 So. 215, at 218:

> "[7, 8] It is generally recognized that a promise, or apparent promise, which reserves by its terms

> to the promisor the privilege of alternative conduct, is insufficient as a consideration if any of the reserved alternative courses of conduct would be insufficient if it alone were bargained for. 1 A.L. I. Restatement, Contracts Sec. 79. The converse of this proposition is likewise true. This is so because, where a promise is sufficient as a consideration if it alone were bargained for and given in exchange for a promise on the other side, it is sufficient as a consideration for as many promises as the opposite party has bargained for and given in exchange for it. 1 A.L. I. Restatement, Contracts Sec. 83."

It is arbitrary and capricious to assess taxes on the basis of speculation, said the New Mexico Supreme Court in *Garner vs. State Tax Commission*, 378 P.2d 619.

The tax here complained of is imposed, not by legislative action, but by administrative directive and now approved by judicial construction. During the some 30 years "subject to mortgages" were excluded from taxation pursuant to the rulings of the Attorney General, the legislature did not act to change the law. The third opinion of the Attorney General, the interpretation by the Comptroller and the decision of the Florida Supreme Court have imposed a new tax by administrative and judicial action, contrary to the doctrine of separation of powers.

The tax is imposed on the mortgage for the second time, said tax having already been paid on said note and mortgage when it was first made and recorded.

CONCLUSION

Petitioner has been denied due process and equal protection in that:

A. A tax has been assessed against petitioner arbitrarily based on speculation.

B. Petitioner has not been afforded a hearing on the amount of the tax prior to its assessment, imposition and collection.

C. The question of taxable "consideration" has been conclusively presumed against petitioner, with no opportunity to repel the presumption.

D. The tax imposed is based on the amount of a mortgage assessed for a second time, same having been already taxed when the mortgage was first made and recorded, without any subsequent assumption, assignment or transfer thereof.

E. The tax is imposed by administrative action and judicial interpretation, without legislative authority.

This appears to be a case of first impression in that the jurisdiction of the Supreme Court of the United States does not appear to have been invoked to review a tax imposed on a speculative consideration prior to this time. The field is enormous in which the states and municipalities might impose taxes on speculative values and considerations if permitted to do so, unrestrained by the exigencies of due process and equal protection.

The pressures on government to find new sources of revenue are such that this breach of the constitutional citadel will be widened if not restrained, and it will be hereafter relied on as authority for similar invasions.

Petitioner urges that this cause merits review by the Court.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the Supreme Court of the State of Florida to the end that the judgment of the Supreme Court of Florida may be reviewed and reversed by this Honorable Court.

Respectfully submitted,

RALPH H. BEARDEN, JR.,
ATTORNEY, P.A.
Attorney for Petitioner

By RALPH H. BEARDEN, JR.

648 S.W. 12 Avenue
Miami, Florida

TO: Robert L. Shevin
Attorney General
State of Florida

Attention: John N. Hogenmuller
Assistant Attorney General
Counsel for Respondents

You are hereby notified that on the 21 day of June, 1971, the petitioner, KENDALL HOUSE APARTMENTS, INC., by and through the undersigned attorney, filed in the Supreme Court of the United States the foregoing petition for review on writ of certiorari of the decision of the Supreme Court of Florida in the case numbered 39,647 in that Court in which KENDALL HOUSE APARTMENTS, INC., a Florida corporation, is plaintiff, and the DEPARTMENT OF REVENUE, an agency of the State of Florida, et al, are respondents.

Copy of said petition is herewith served upon you.
DATED June 21, 1971.

RALPH H. BEARDEN, JR.,
ATTORNEY, P.A.
Attorney for Petitioner

By RALPH H. BEARDEN, JR.
648 S.W. 12 Avenue
Miami, Florida 33130

CERTIFICATE OF SERVICE

I, Ralph H. Bearden, Jr., a member of the Bar of the Supreme Court of the United States, and of counsel for the petitioner herein, hereby certify that I have this day served three (3) printed copies of the foregoing Petition for Writ of Certiorari and appendices thereto on the respondents herein, by depositing same in a United States Post Office with first class postage prepaid addressed to counsel of record for the respondents, as follows:

Robert L. Shevin
Attorney General
State of Florida
Tallahassee, Florida 32304

Attention: John H. Hogenmuller
Assistant Attorney General
Counsel for Respondents

DONE this the 21 day of June, 1971.

RALPH H. BEARDEN, JR.

RALPH H. BEARDEN, JR.

APPENDIX

INDEX

A—Opinion of Supreme Court of Florida

B—Petition for Rehearing

C—Order on Petition for Rehearing

D—Alternative Writ of Mandamus

E—Opinion of Attorney General of August 13, 1945

F—Opinion of Attorney General of November 25, 1959

G—Opinion of Attorney General of May 12, 1961

H—Directive of State Comptroller to Circuit Clerks

APPENDIX A

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A. D. 1971

Case No. 39,647

KENDALL HOUSE APARTMENTS, INC., a Florida Corporation,

Relator,

-vs-

THE DEPARTMENT OF REVENUE, an agency of the State of Florida, ET AL.,

Respondents.

Opinion filed February 24, 1971

Case of original jurisdiction- Mandamus

Ralph H. Bearden, Jr., for Relator

Robert L. Shevin, Attorney General and John N. Hogenmuller, Assistant Attorney General, for Respondents

BOYD, J.

This cause is before us on petition for writ of mandamus to obtain a refund of documentary tax paid on two parcels of land. We issued the alternative writ on April 30, 1970, and have heard argument of the parties.

On May 29, 1968, relator Kendall House Apartments, sold certain real property located in Dade County, Florida, and agreed with the grantee that it would pay any and all recording fees and stamp taxes involved in the transaction. The property sold was subject to a mortgage payable to the Life Insurance Company of Virginia, but the mortgage was not assumed by the grantee. The purchase price of the property was $650,000.00. The property was sold subject to an outstanding mortgage of $493,705.68.

Taxes were paid on both deeds based upon the $650,000.00 cash consideration. The State claimed that a balance of $1,481.40 in regular documentary stamp taxes remained owing on the deeds under Florida Statutes §201.02. The basis of the State's claim for the additional tax was the outstanding mortgage on the property. The State contends that the mortgage value constituted consideration passing to the grantor since the grantee took title subject to the mortgage.

Relator contends that the sole consideration was the payment of the $650,000.00 on which the documentary stamp taxes were paid. In response to the additional assessment by the State, the relator paid the tax under protest and made requisition for refund, which requisition was formally denied by the Department of Revenue.

Florida Statutes §201.02 provides:

> "On deeds, instruments, or writings, whereby any lands, tenements, or other realty, or any interest therein, shall be granted, assigned, transferred, or otherwise conveyed to or vested in the purchaser, or any other person by his direction, on each

> one hundred dollars of the consideration therefor the tax shall be thirty cents; provided, that when the full amount of the consideration for the execution, assignment, transfer, or conveyance, is not shown in the face of such deed, instrument, document, or writing, then in such event the tax shall be at the rate of thirty cents for each one hundred dollars, or fractional part thereof, of the consideration therefor."

The question before us is whether "consideration" for the purpose of measuring the amount of documentary tax due under Florida Statutes §201.02 includes the value of an outstanding mortgage on the property, which mortgage is not expressly assumed by the buyer, although the property is sold subject to the mortgage. We agree with the contention of respondents herein that the clear purpose of Florida Statutes §201.02 is to place a documentary stamp tax on the total consideration involved in a transfer of real property and that this amount includes any outstanding mortgages.

This Court is well aware of the distinction, urged by relator, between a grantee who assumes and agrees to pay an outstanding mortgage and a grantee who takes subject to an outstanding mortgage. The former may be held personally liable; the latter is threatened only with the loss of his equity in the property in the event of foreclosure. In the absence of clear language to the contrary on a deed conveying real property, a grantee who "assumes" a mortgage encumbering real property becomes personally liable to pay same as though he is "assuming and agreeing to pay" it. The use of the words "subject to" the mortgage in the absence of contrary language on the deed, eliminates

the personal liability of the grantee to pay the indebtedness which the mortgage secures. It is an economic fact that persons who acquire property "subject to" a mortgage normally pay the indebtedness represented by the mortgage in order to prevent the loss of the property to the same extent as those persons acquiring property "assuming and agreeing to pay" the mortgage.

In the instant case, the concept of "consideration" as used in Florida Statutes §201.02 is clearly satisfied. The Sale and Purchase Agreement of the parties dated April 26, 1968, contemplates a transfer of the burden of making the mortgage payments to the grantee as of the date of closing and a corresponding benefit derived by the grantor who agreed to make mortgage payments only up until the time of closing, including June 1, 1968. The Stipulation of the parties filed in this Court states that the grantee of the property had, in fact, made all mortgage payments since the closing date. This arrangement constitutes a part of the consideration for the transfer of the property. Any other view of the situation is unrealistic.

Accordingly, the alternative writ of mandamus heretofore issued is discharged.

It is so ordered.

ERVIN, Acting Chief Justice, ADKINS and DREW (Retired) JJ., and SPECTOR, District Court Judge, concur

APPENDIX B

[TITLE OMITTED]

PETITION FOR REHEARING

TO THE HONORABLE, THE SUPREME COURT OF FLORIDA:

COMES NOW KENDALL HOUSE APARTMENTS, INC., the relator, and petitions for rehearing in this cause, as grounds therefor assigns the following omissions, oversights, causes or grounds:

1. In its opinion filed February 24, 1971, the Court failed or omitted to consider that it is speculative as to whether the buyer will pay the "subject to" mortgage.

2. For that the Court failed or omitted, in its said opinion, to determine whether a speculative consideration is a binding, legal and taxable consideration.

3. For that it is a denial of due process, in contravention of the Constitutions of the State of Florida and the United States to deprive relator of property by means of tax based on speculation.

4. For that it is a denial of equal protection of the law in contravention of the Constitutions of the State of Florida and the United States to compel relator to pay a tax based on a speculative consideration.

5. For that it is violative of the equal protection clause of Article XIV of the United States Constitution and

the equal protection clause of Article I, Section 2, of the Constitution of the State of Florida to treat a "subject to mortgage" the same as a "mortgage assumed" for purposes of taxation.

WHEREFORE, YOUR PETITIONER PRAYS:

A. That a rehearing be granted.

B. For permission to file supplemental supporting brief.

C. That oral argument be allowed on said rehearing.

APPENDIX C

[TITLE OMITTED]

On consideration of the Petition for Rehearing filed by Attorney for Relator,

IT IS ORDERED by the Court that said petition be, and the same is hereby, denied.

A TRUE COPY,

TEST:

/s/ Sid J. White
SID J. WHITE
CLERK SUPREME COURT

APPENDIX D

[TITLE OMITTED]

ALTERNATIVE WRIT OF MANDAMUS

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA, TO: HONORABLE CLAUDE R. KIRK, JR., AS GOVERNOR OF THE STATE OF FLORIDA; HONORABLE EARL FAIRCLOTH, AS ATTORNEY GENERAL OF THE STATE OF FLORIDA; HONORABLE BROWARD WILLIAMS, AS TREASURER AND INSURANCE COMMISSIONER OF THE STATE OF FLORIDA;

HONORABLE FRED O. DICKINSON, JR., AS COMPTROLLER OF THE STATE OF FLORIDA; HONORABLE TOM ADAMS, AS SECRETARY OF STATE OF THE STATE OF FLORIDA; HONORABLE FLOYD T. CHRISTIAN, AS COMMISSIONER OF EDUCATION OF THE STATE OF FLORIDA; AND HONORABLE DOYLE CONNER, AS COMMISSIONER OF AGRICULTURE OF THE STATE OF FLORIDA, GREETINGS:

WHEREAS, upon petition filed herein by petitioner, Kendall House Apartments, Inc., it has been made to appear that:

I

This is an application in an original proceeding before the Supreme Court for Writ of Mandamus. The defendant is THE DEPARTMENT OF REVENUE, an agency of the State of Florida, authorized to represent the public generally, consisting of CLAUDE R. KIRK, JR., as Governor of the State of Florida; EARL FAIRCLOTH, as Attorney General of the State of Florida; BROWARD WILLIAMS, as Treasurer and Insurance Commissioner of the State of Florida; FRED O. DICKINSON, JR., as Comptroller of the State of Florida; TOM ADAMS, as Secretary of State of the State of Florida; FLOYD T. CHRISTIAN, as Commissioner of Education of the State of Florida; and DOYLE CONNER, as Commissioner of Agriculture of the State of Florida.

II

The issue raised by this petition is the legality of defendants compelling payment of documentary stamp

taxes pursuant to Section 201.02, Florida Statutes on a note secured by a mortgage, for the second time, said tax having already been paid on said note and mortgage when first made and recorded, and the subsequent conveyance having been made subject to the mortgage but expressly without its assumption, by consent of the holder of the mortgage. The documentary stamp tax in question was paid by the plaintiff under protest and on defendants' demand. Plaintiff thereafter made application for refund, and said application was denied by defendants.

III

There are no questions of fact raised which will require the taking of testimony and the parties have stipulated the facts essential to a determination of the controversy by written stipulation filed herewith.

IV

On May 29, 1968, plaintiff transferred by two warranty deeds certain real estate located in Dade County, Florida, to Clinton H. Churchill and Clinton D. Churchill (hereinafter sometimes referred to for brevity as "buyers" or "the buyers".) The transactions involving the two deeds are somewhat intertwined and were handled simultaneously, but only the deed of one of these transactions is involved in this cause of action. Said deed is attached to the STIPULATION as Exhibit "A".

V

The property conveyed by the deed was, at the time of sale and recording of the deed, subject to a mortgage in the amount of $493,705.68 payable to Life Insurance

Company of Virginia. As set out in the "Closing Statement" (copy attached to the STIPULATION as Exhibit "B"), the sole and total consideration from the buyers for the two parcels of property was a payment of $650,000.00. As was noted at the bottom of the "Closing Statement", the two parcels were sold "subject to mortgages for $1,070,106." The aforesaid mortgage in the amount of $493,705.68, the subject of this action, was included in the above described mortgage total.

VI

The question of assumption of said mortgage was negotiated strenuously between the plaintiff-seller and the buyers, the buyers refused to assume the same, and plaintiff agred to pay all recording fees and stamp taxes incident to the sale. (STIPULATION, Page 2)

VII

By the terms of the sale, and the provisions of the deed, the buyers can abandon the property without liability for the mortgage and the note secured thereby. In such event, the plaintiff-seller alone is responsible to the holder of the note and mortgage, who can foreclose his mortgage and sue only the plaintiff-seller for any deficiency or the holder can elect to hold plaintiff-seller alone liable on the note without foreclosure of the mortgage.

VIII

The mortgagee, Life Insuarnce Company of Virginia, agreed and consented to the sale of said realty by the plaintiff-seller to the buyers without the buyers assuming

the note and mortgage thereon, and said mortgagee expressly provided in its agreement that it would continue to hold the plaintiff, as the original mortgagor, liable on the indebtedness secured by said mortgage.

IX

When the said note and mortgage held by Life Insurance Company of Virginia was first taken and recorded, the tax levied under Section 201.02, Florida Statutes, was paid on the note evidencing the debt secured by said mortgage, and documentary stamps evidencing the payment of said tax were affixed to said mortgage note at the time of recording.

X

Taxes on both the aforesaid deeds were paid without question to the extent of the $650,000.00 consideration recited in the "Closing Statement". Defendants then claimed a balance of $1,481.40 in regular documentary stamp taxes pursuant to Section 201.02, Florida Statutes, based on the fact that the mortgage of $493,705.68 was outstanding. (STIPULATION, Page 2)

XI

In response to an assessment by the State, plaintiff paid the tax under protest on April 24, 1969, (STIPULATION, Page 3). Plaintiff paid the tax only at the insistence of the buyers, the defendants, and in compliance with plaintiff's contract to pay any and all recording fees and stamp taxes.

XII

Plaintiff submitted to defendants a requisition for refund on or about June 30, 1969, and said requisition was formally denied on or about July 10, 1969 (STIPULATION, Page 3 and Exhibits "E" and "F", attached thereto).

XIII

Plaintiff avers that defendants wrongfully assessed said tax and wrongfully denied plaintiff's application for refund. Plaintiff avers that defendants' said actions were unlawful in that (1) the subject-to note and mortgage were not taxable as part of the consideration for the sale by plaintiff to the buyers, and (2) the imposition of said tax amounted to a double taxation which was unconstitutional and unlawful in that said tax had already been paid at the time the note and mortgage were recorded.

XIV

It is stipulated and agreed between the parties that the other deed transaction herein referred to, which occurred simultaneously with the one at issue, and in regard to which no taxes have been collected, will be subject to and finally controlled by the final decision made in this proceeding and the State of Florida shall act promptly after such final decision upon either the collection of said tax or the refund of the one plaintiff sues herein to recover in the same manner as if both taxes had been included in this mandamus proceeding without the necessity of either party taking any further action respecting such claim or refund (STIPULATION, Page 3).

NOW, THEREFORE, these are to command you the said Honorable Claude R. Kirk, Jr., as Governor of the State of Florida; Honorable Earl Faircloth, as Attorney General of the State of Florida; Honorable Broward Williams, as Treasurer and Insurance Commissioner of the State of Florida; Honorable Fred O. Dickinson, Jr., as Comptroller of the State of Florida; Honorable Tom Adams, as Secretary of State of the State of Florida; Honorable Floyd T. Christian, as Commissioner of Education of the State of Florida; and Honorable Doyle Conner, as Commissioner of Agriculture of the State of Florida, as and constituting the Department of Revenue to refund to petitioner the tax herein complained of and find the assessment void, or in the alternative, that you show cause via return and brief on or before the 20th day of May, 1970 why peremptory writ of mandamus commanding the same to be done by you should not issue. Petitioner shall file its reply brief on or before May 29, 1970.

WITNESS the Honorable Richard W. Ervin, Chief Justice of the Supreme Court of Florida, and the Seal of said Court, at Tallahassee, the Capital, on this the 30th day of April, 1970.

/s/ Sid J. White

Clerk of the Supreme Court of Florida

APPENDIX E

August 13, 1945.—045-251.

DOCUMENTARY STAMPS—ASSIGNMENTS OF MORTGAGES AND DEEDS

QUESTIONS: 1: What amount of state documentary stamps is required to be affixed to assignments of mortgages whereby the whole, or any part of the indebtedness secured thereby, is assigned by the mortgagee to an assignee?

2. What amount of state documentary stamps is required to be affixed to a deed conveying real estate showing a consideration of $2,000.00 for the equity of the grantor and reciting that the conveyance is subject to an unpaid principal balance of $3,000.00 on an existing mortgage and also subject to unpaid taxes amounting to $500.00?

To Honorable W. S. Weaver, Clerk of the Circuit Court, Bay County, Panama City, Florida:

1. The language of our excise tax laws on documents is not sufficiently broad and inclusive to embrace therein assignments of mortgages on real estate unless the mortgage assigned is one which incorporates " the certificate of indebtedness, not otherwise shown in separate instruments." (Section 201.08, Florida Statutes, 1941; 1943-44 Biennial Report, 227; State ex rel. Rogers v. Sweat, 113 Fla. 797, 152 So. 432). Therefore, no state documentary stamps are required on assignments of mortgages as such.

2. It appears from the above question that the grantee under the deed did not assume the payment of the existing mortgage and tax indebtedness but that the same was merely recognized as existing and the deed made subject thereto. The grantee is not personally bound to pay said indebtedness although payment of the same may be necessary to protect his property. I am therefore of the opinion that the consideration for purpose of state documentary stamps was $2,000.00 and that $2.00 in stamps would be the proper amount to attach.

The abve answer to the second question should not be construed as covering the question in cases where mortgages and tax indebtedness are assumed by the grantee.

APPENDIX F

059-242—November 25, 1959

TAXATION

DOCUMENTARY STAMP TAXES—DEEDS ASSUMING, TAKEN SUBJECT TO EXISTING MORTGAGES—§201.02, F. S.

To: Ray E. Green, State Comptroller, Tallahassee
QUESTIONS:

What is the proper amount of documentary stamp tax due under Ch. 201, F. S., on:

1. A deed wherein real property is purchased subject to an existing mortgage;

2. A deed wherein an existing mortgage is expressly assumed, or assumed by collateral agreement arising out of the same transaction involving the purchase by deed?

"On deeds, instruments, or writings, whereby any lands, tenements, or other realty, or any interest therein, shall be granted, assigned, transferred, or otherwise conveyed to or vested in the purchaser, or any other person by his direction, on each one hundred dollars of the consideration therefor" there is imposed a state documentary stamp tax of 20¢ (§201.02, F. S.). Under the preceding section, only one taking real property as a "purchaser" is subject to the tax (State ex rel Palmer-Florida Corp. v. Green, Fla., 88 So. 2d 493); furthermore, said section

applies only to those transfers given for a monetary consideration and does not apply where an absolute gift is made of the property (Culbreath v. Reid, Fla., 65 So. 2d 556). As a general rule, when a documentary stamp tax is sought to be levied "the law contemplates that such tax should be confined to the actual monetary consideration or to considerations which have a reasonably determinable pecuniary value." (DeVore v. Gay, Fla., 39 So. 2d 796, text 797). Only those considerations having a monetary or pecuniary value may be taken into account in computing documentary stamp taxes under §201.02, supra.

"When a conveyance of land is made expressly subject to an existing mortgage . . . the purchaser takes merely the equity of redemption, and the conveyance amounts merely to a conveyance of whatever interest or estate the grantor has after the debt is satisfied out of the land." (59 C. J. S. 561, §397). The mere statement in a deed of conveyance that the real estate is conveyed to the grantee subject to an existing mortgage does not make the grantee personally liable for the payment of the existing mortgage debt. (Alabama-Florida Co. v. Mays, 111 Fla. 100, 149 So. 61). Furthermore, the recital in a deed that the deed is "subject to" an existing mortgage is not sufficient to create an obligation on the part of the grantee to undertake payment of said mortgage (Fort Pierce Bank & Trust Co. v. Smith, 108 Fla. 313, 146 So. 225. text 227).

It thus seems clear from the foregoing authorities that a grantee under a deed taken subject to an existing mortgage is not personally liable for the payment of the mortgage. Furthermore, since there is no obligation on the part of the grantee to pay the mortgage, there is no consideration passing between the parties such as could be reduced to a monetary or pecuniary value.

A different situation arises where the grantee *assumes* an existing mortgage. "It may be assumed to be settled in this state that when a deed contains a convenant by the grantee assuming and agreeing to pay a mortgage on the land, and the deed is accepted by him, he obligates himself to pay the mortgage debt as conclusively as if he had signed a written agreement to that effect *as a part of the consideration to be paid for the lands conveyed.*" (Emphasis supplied.) (Ackely v. Noggle, 97 Fla. 640, 121 So. 882, text 883). Furthermore, "it is not necessary that the assumption agreement be incorporated in the deed of conveyance where the debt assumed represents a part of the consideration of purchase of the property concerned, or even that it should be in writing; a parol agreement by the grantee at the time of the taking of the deed being sufficient. Enns-Halbe Co. v. Templeton, 101 Fla. 609, 135 So. 135." (Alabama-Florida Co. v. Mays, 111 Fla. 100, 149 So. 61, text 65; Yates v. St. Johns Beach Devel. Co., 129 Fla. 429, 176 So. 422, text 423). This is in accord with the general rule that the assumption of an existing mortgage is and constitutes a part of the consideration for a conveyance by deed (20 C. J. S. 612, §17) and that the assumption of the existing mortgage debt need not be incorporated into the conveyance but may be contained in a separate written agreement, or parol agreement except where otherwise provided by statute (59 C. J. S. 574, §406c). Accordingly, it would appear that the assumption of an existing mortgage by the grantee to a deed of purchase (either by express recital in the deed itself, collateral written agreement, or parol agreement at the time of taking of the deed) constitutes a "consideration" for the deed within the meaning of §201.02, to the same extent as if the grantee therein had executed a purchase money mortgage as a part of the consideration.

In answer to question 1, the proper amount of documentary stamp tax due on a deed wherein the grantee purchases real property *subject to* an existing mortgage should be computed on the monetary or pecuniary consideration paid for the land, exclusive of the amount of the existing mortgage. Whereas, in question 2, where an existing mortgage, or mortgages, is *assumed* by the grantee in the deed, either by express recital in the deed, collateral written agreement, or parol agreement at the time of taking of the deed, the tax should be computed by adding the outstanding balance due on the assumed mortgage to other monetary or pecuniary considerations paid for the deed.

The above observations appear to answer your questions. Your file is returned herewith.

APPENDIX G

061-77—May 12, 1961

TAXATION

DOCUMENTARY STAMP TAXES REQUIRED ON CONVEYANCE SUBJECT TO AN OUTSTANDING MORTGAGE OR OTHER LIEN WITHOUT GRANTOR ASSUMING OR AGREEING TO PAY SAY MORTGAGE OR LIEN—

§§201.01, 201.02, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

> *What is the measure of documentary stamp taxes under §201.02, F.S., where a parcel of real property is sold and conveyed subject to an outstanding mortgage or other lien encumbering it, without the grantee assuming and agreeing to pay the said mortgage or lien?*

Section 201.01, F. S., imposes a documentary stamp tax on certain documents, bonds, debentures or certificates of stock and indebtedness, and other documents, instruments, matters, writings and things described in subsequent sections of Ch. 201, F. S. Under §201.02 of said statutes the said tax is imposed on "deeds, instruments, or writings, whereby any lands, tenements, or other realty, or any interest therein, shall be granted, assigned, transferred or otherwise conveyed to or vested in the purchaser, or any other person by his direction . . ." The amount of the tax imposed "on each one hundred dollars of the consideration therefor the tax shall be twenty cents; . . ." This tax

is imposed upon the actual consideration paid for the property conveyed, whether mentioned in the instrument by which the conveyance is made or not. This Florida statute differs from §4361, title 26, of the U. S. code, upon the same subject, where the amount of the federal stamp tax on conveyances is measured by "the consideration or value of the interest or property conveyed, *exclusive of the value of any lien or encumbrance* remaining thereon at the time of sale, . . ." (Emphasis supplied.) The Florida statute was derived from Ch. 15787, 1931, and the federal statute from the federal revenue act of 1924; an examination of these acts shows that the statutes differed as above when the Florida act was enacted in 1931, and that the difference has continued since their original enactment.

Although the Florida statute was taken largely from the federal statute and takes the same construction as is given the federal statute in the federal court, except in so far as the Florida statute differs from the federal one (Gay v. Inter-County Tel. and Tel. Co., Fla. 60 So. 2d 22; State ex rel Packard v. Cook, 108, Fla. 157, 146 So. 223), the fact that the legislature of Florida deviated materially from the federal statute, when it enacted Ch. 15787, 1931, now appearing, with amendments, as §201.02, F. S., having deleted the provision of the federal statute excluding the value of mortgages and liens encumbering the property sold and conveyed when determining the amount of the federal tax, thereby indicating an intention of including such value of mortgages and liens when calculating the state tax, indicates an intention on the part of the Florida legislature not to follow the federal statute in this connection. It is evident from the above and foregoing that the method of determining the federal tax and of determining the Florida tax differs materially.

This brings us to the question of the legal and equitable obligation of a grantee who purchases real property subject to a mortgage or lien encumbering the said property, but who does not assume and agree to pay the said mortgage or lien. The mere statement in a deed of conveyance that the real property conveyed by it is conveyed subject to an existing mortgage does not make the grantee personally liable for the payment of such mortgage (Alabama-Florida Co. vs. Mays, 111 Fla. 100, 149 So. 61; Fort Pierce Bank and Trust Co. vs. Smith, 108 Fla. 313, 146 So. 225, text 227). A different situation arises when the grantee assumes and agrees to pay an existing mortgage. "It may be assumed to be settled in this state that when a deed contains a covenant by the grantee assuming and agreeing to pay a mortgage on the land, and the deed is accepted by him; he obligates himself to pay the mortgage debt as conclusively as if he had signed a written agreement to that effect, as a part of the consideration to be paid for the lands conveyed." (Ackley vs. Noggle, 97 Fla. 640, 121 So. 882, text 883). "It is not necessary that the assumption agreement be incorporated in the deed of conveyance where the debt assumed represents a part of the consideration of purchase of the property concerned, or even that it should be in writing; a parol agreement by the grantee at the time of the taking of the deed being sufficient." (Alabama-Florida Co. vs. Mays, supra; see also Yates vs. St. Johns Beach Devel. Co., 129 Fla. 411, 176 So. 422, text 423).

Although a grantee, taking a conveyance of real property subject to an existing mortgage encumbering it, does not assume and agree to pay the same, so as to become personally liable for the payment of the same, is the said mortgage indebtedness to be presumed to have been

included in the purchase price for the purposes of determining the documentary stamp tax imposed by §201.02, F. S.? This we feel to be the case. In 4 Pomeroy's Equity Juris., 5th Ed., 614, 615, §1205, it is stated that: "*A grantee who thus takes a conveyance subject to a mortgage is presumed to have included the mortgage debt in the purchase price*, and is not, therefore, permitted to dispute the validity of the mortgage; . . ." although he is not personally liable for the mortgage debt. By accepting the deed of conveyance, stating that it is made subject to a mortgage indebtedness, although he does not personally obligate himself to pay the mortgage, he makes the property purchased by him liable for the payment of the same (see 4 Pomeroy's Equity Juris., supra; Kay v. Castleberry, 99 Ark. 618, 139 S. W. 645, text 648; Fogarty v. Hunter, 83 Or. 183, 162 P. 964, text 971; Jones on Mortgages, 8th Ed., 937; Ann. in L.R.A. 1917C 832, et seq.) The above statement in Pomeroy's Equity Juris. has been cited with approval by the Florida courts.

The district court of appeal, 3rd district, in Zimmerman v. Hill, Fla. App., 100 So.2d 432, stated that "the chancellor below relied upon Spinney v. Winter Park Building and Loan Association, 120 Fla. 453, 162 So. 899, on pp. 903, 904, wherein the court stated: '. . . In Alabama-Florida Co. v. Mays, 111 Fla. 100, text 108, 149 So. 61, 64 (91 A.L.R. 139) and Id., 111 Fla. 783, 149 So. 661, we said: "*It is conceded that, where a grantee takes a conveyance subject to a mortgage, he will be presumed to have included the mortgage debt in the purchase price . . .*"'" In 59 C.J.S. 561, §397, under the title "Presumptions," the statement is made that: "It may be presumed that a purchaser subject to a mortgage bought the land at its value, less the amount of the indebtedness secured by the mort-

gage, and that *he included the mortgage debt in the purchase price.* Also, where a conveyance subject to a mortgage states a nominal consideration, the mortgage debt will be presumed to have been included in the purchase price. The presumption may be overcome, as by evidence of an agreement to the contrary between the partes, but it has been held that it may not be overcome to the prejudice of third prsons who may be thereby affected. The presumption does not arise where the purchaser paid the full amount agreed on for a clear title." In 37 Am. Jur. 381, §1102, it is stated that: "In the event of a conveyance of mortgaged property subject to the mortgage, it is generally presumed that the amount of the mortgage has been deducted from and is a part of the purchase price. It is consequently frequently asserted that mortgaged property transferred subject to the mortgage is the primary source for the satisfaction of the mortgage. The ordinary significance of this statement is that as between the parties to the transfer, and to the extent of the grantee's interest in the property, the grantee is a principal and the grantor a surety."

From the above and foregoing, especially in the light of Zimmerman v. Hill, Spinney v. Winter Park Bldg. and Loan Ass'n, and Alabama-Florida Co. v. Mays, a grantee taking a conveyance of real property subject to an outstanding mortgage is presumed to have included the mortgage debt as a part of the purchase price so that, although there is no assumption of the mortgage debt as a personal obligation, the purchaser's interest in the lands conveyed becomes obligated for the payment of the said mortgage. Therefore, the amount of a mortgage encumbering the lands purchased, subject to which the conveyance is made and which was not personally assumed by the said grantee,

is presumed to have become a part of the consideration for the conveyance within the purview of §201.02, F. S. The purchase of real property subject to a mortgage encumbering the same, but which mortgage the grantee does not assume and agree to pay, is not in law the purchase of the equity of redemption of a mortgagor. In Pierson v. Bill, 138 Fla. 104, 189 So. 679, text 683, a deed of conveyance contained a limiting provision that "it is mutually understood and agreed that the grantee herein expressly neither assumes nor agrees to pay the above described mortgages, taxes and assessments; it being the intention of both parties to this conveyance that the grantee herein is simply purchasing the equity of the grantee (grantor) herein in the above described real and personal property." The court, after discussing briefly the meaning of "equity" and "equity of redemption," stated that: "In this state, the mortgagor retains the property subject to the lien, so technically the concept 'equity' or 'equity of redemption' is unknown to our law. In its common acceptation, it has reference to the value of the property in excess of encumbrances that amount to a lien and that was the sense in which it was employed in the deed brought in question." Notwithstanding, the language in the deed above quoted the deed was held to be a bargain and sale deed, and not a conveyance of an equity of redemption, if such exists under the laws of this state.

The measure of documentary stamp taxes under §201.02, F.S., under the facts posed by the above stated question, is the consideration paid for the conveyance, which must be presumed to include any mortgage, lien or encumbrance to which the conveyance is made subject. Although doubt is cast, by the above language quoted from Pierson v. Bill, of a mortgagor being vested with a tech-

nical equity of redemption subject to a transfer by him, we do not here finally dispose of that question. We here go no further than to hold that a conveyance of real property subject to existing mortgages, liens and other encumbrances, expressly conveyed as being subject thereto, but without the vendee expressly and agreeing to pay the same and making himself personally liable for the payment thereof, is not a conveyance of an equity of redemption and that the amount of the mortgage, lien or encumbrance mentioned is presumed to be a part of the purchase price.

In so far as the opinions of this office of Aug. 13, 1945 (045-251; 1945-6 AGO 337) and of Nov. 25, 1959 (059-242; 1959-60 AGO 378) conflict with this opinion, they are overruled. Where there is an assumption and agreement to pay mortgages, liens and encumbrances encumbering property conveyed, made after the execution, delivery or recording of the deed of conveyance, to which the grantor was not a party, it should be noted that such agreement would be a separate transaction and would amount to a written obligation to pay money under §201.08, F. S. This would seem to tend to confirm the presumption mentioned in Zimmerman v. Hill, Spinney v. Winter Park Bldg. and Loan Ass'n and Alabama-Florida Co. v. Mays, supra.

APPENDIX H

(Comptroller's Office State of Florida Seal) Ray E. Green, Comptroller

State of Florida
COMPTROLLER'S OFFICE
Tallahassee

TO ALL CLERKS OF THE CIRCUIT COURT AND DOCUMENTARY STAMP TAX INSPECTORS:

I am enclosing Attorney General's Opinion 061-77 dated May 12, 1961. The question in this opinion is the measure of documentary stamps under Section 201.02, Florida Statutes, where a parcel of real property is sold and conveyed subject to an outstanding mortgage or other lien encumbering it, without the grantee assuming and agreeing to pay the said mortgage or lien.

The Attorney General in this opinion has ruled the measure of documentary stamps under Section 201.02 is the consideration paid for the conveyance, which must include any mortgage, lien or encumbrance executed, assumed, or to which the conveyance is made subject. Therefore, under this opinion when a deed is given, the consideration for tax purposes is to be determined by adding the cash payment to any mortgage or lien executed or assumed, or any mortgage to which the conveyance is made subject. It makes no difference if the mortgage is executed, assumed or subject to in the conveyance, it must be included in determining the consideration for tax purposes. The tax is at the rate of twenty cents for each one hundred dollars of this consideration.

After the execution and delivery of the conveyance, if the grantee by agreement assumes and agrees to pay a mortgage, lien, or other encumbrance to which the grantor is not a party, the assumption agreement is a separate transaction and is taxable at the rate of ten cents on each one hundred dollars of the unpaid balance under Section 201.08.

Very truly yours,

RAY E. GREEN,
COMPTROLLER

BY: /s/ M. C. O'Berry, Chief

M. C. O'Berry, Chief
Documentary Stamp Tax
Department

MC O/cap
enclosure
Adm inter.

70-323

Supreme Court, U.S.
FILED
AUG 19 1971
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

~~NO. 1848~~ [redacted]

KENDALL HOUSE APARTMENTS, INC.,
a Florida Corporation,

Petitioner,

vs.

THE DEPARTMENT OF REVENUE, an agency of the State of Florida, consisting of CLAUDE R. KIRK, JR., as Governor of the State of Florida; EARL FAIRCLOTH, as Attorney General of the State of Florida; BROWARD WILLIAMS, as Treasurer and Insurance Commissioner of the State of Florida; FRED O. DICKINSON, JR., as Comptroller of the State of Florida; TOM ADAMS, as Secretary of State of the State of Florida; FLOYD T. CHRISTIAN, as Commissioner of Education of the State of Florida; and DOYLE CONNER, as Commissioner of Agriculture of the State of Florida,

Respondents.

RESPONSE TO
PETITION FOR WRIT OF CERTIORARI

ROBERT L. SHEVIN
Attorney General

JOHN N. HOGENMULLER
Assistant Attorney General

WINIFRED L. WENTWORTH
Assistant Attorney General

Counsel for Respondents.

TOPICAL INDEX

	Page
OBJECTIONS TO JURISDICTION	1
STATEMENT OF THE CASE	1-3
ISSUES INVOLVED	4
ARGUMENT	
ISSUE I	5-10
ISSUE II	11-12
CONCLUSION	12-13
PROOF OF SERVICE	14

TABLE OF CITATIONS

Hanson v. Denckla, 357 U.S. 235, 243-245 (1958)	11
Herb v. Pitcairn, 324 U.S. 117, 125-126 (1945)	6
Radio Station WOW v. Johnson, 326 U.S. 120, 128 (1945)	12
Wilson v. North Carolina, 169 U.S. 586, 593-595 (1898)	9, 10

FEDERAL STATUTES

	Page
26 U.S.C., §4361	2
Supreme Court Rule 19, 28 U.S.C.A.	5

FLORIDA STATUTES

Chapter 15787, Laws of Florida, Acts of 1931	2
Section 201.02	1, 2, 6, 7
Attorney General's Opinion 061-77	7

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

NO. 1848

KENDALL HOUSE APARTMENTS, INC.,
a Florida Corporation,

Petitioner,

vs.

THE DEPARTMENT OF REVENUE, an agency of the State of Florida, consisting of CLAUDE R. KIRK, JR., as Governor of the State of Florida; EARL FAIRCLOTH, as Attorney General of the State of Florida; BROWARD WILLIAMS, as Treasurer and Insurance Commissioner of the State of Florida; FRED O. DICKINSON, JR., as Comptroller of the State of Florida; TOM ADAMS, as Secretary of State of the State of Florida; FLOYD T. CHRISTIAN, as Commissioner of Education of the State of Florida; and DOYLE CONNER, as Commissioner of Agriculture of the State of Florida,

Respondents.

RESPONSE TO

PETITION FOR WRIT OF CERTIORARI

OBJECTIONS TO JURISDICTION

The Respondents file this brief in opposition to the Petition for Writ of Certiorari initiated by Petitioner on the grounds that no basis for review pursuant to Rule 19 of this Court has been shown. More particularly, no substantial federal question has been raised and the decision of the Florida Supreme Court is entirely consistent with applicable state law.

STATEMENT OF THE CASE

Respondents are unable to accept Petitioner's statement of the case. Although substantially accurate, Respondents would respectfully restate the case as follows:

This cause arose from an original proceeding in mandamus before the Florida Supreme Court. The issue involved was the legality of the position taken by the Department of Revenue of the State of Florida that "consideration" for purposes of determining documentary stamp tax liability pursuant to Section 201.02, F.S., may include the value of a mortgage which the buyer takes "subject to" rather than expressly assuming.

On May 29, 1968, Petitioner sold certain real property located in Dade County, Florida, to Clinton H. Churchill and Clinton D. Churchill of Buffalo, New York.

The Petitioner agreed with said grantees that Petitioner would pay any and all recording fees and stamp taxes involved in the transaction.

The property was subject to a mortgage payable to the Life Insurance Company of Virginia, but the mortgage was not assumed by the grantees. The contract between the parties called for cash payment of $650,000 over and above the value of the outstanding mortgages on the date of closing. This $650,000 is claimed by Petitioner to be the total consideration involved. Tax was paid on the $650,000 amount.

The State claimed that a balance of $1,481.40 in regular documentary stamp taxes remained owing on the deed in question after that deed was recorded. The State contended that since the aforesaid mortgage was outstanding and figured in the negotiations of the parties, it constituted consideration.

In response to the assessment by the State, the plaintiff paid the tax under protest and made requisition for refund, which requisition was formally denied by the Department of Revenue.

The Respondents traced the legislative history of Section 201.02, F.S., in their presentation to the Florida Supreme Court. The Florida statute evolved from Chapter 15787, Acts of 1931, and was taken largely from 26 U.S.C., §4361, which was

the Federal Documentary Stamp Tax Act.

However, there is a significant difference between the Florida act and the Federal one. The Federal act expressly excluded the value of mortgages when it placed the tax on the consideration or value of the property conveyed, "exclusive of the value of any lien or encumbrance remaining thereon at the time of sale." The Florida law, although otherwise nearly identical, did not contain any exclusion of liens or other encumbrances.

The Respondents argued that the contract of the parties which called for a purchase price of $650,000, "over and above the principal balances as of the date of closing on these certain existing first mortgages encumbering said property," showed the intent of the parties to include the mortgage values as "consideration".

The Supreme Court of Florida agreed with the position of the Respondents. The case was argued and briefed on purely state legal grounds and no "Federal Question" was ever raised until Petitioner's Petition for Rehearing in the Florida Supreme Court.

ISSUES INVOLVED

ISSUE I

WHETHER A SUBSTANTIAL FEDERAL QUESTION IS INVOLVED.

ISSUE II

WHETHER AN ALLEGED FEDERAL QUESTION WHICH WAS NOT RAISED UNTIL PETITION FOR REHEARING IN THE STATE SUPREME COURT IS A PROPER SUBJECT FOR REVIEW BY THIS COURT.

ARGUMENT

ISSUE I

WHETHER A SUBSTANTIAL FEDERAL QUESTION IS INVOLVED.

The guidelines of this Court governing writs of certiorari are well established and U.S. Supreme Ct. Rule 19, 28 U.S.C.A., states in pertinent part:

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered.
>
> "(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this Court."

Respondents respectfully submit that no federal question of substance was involved in the decision of the Florida Supreme Court sought to be reviewed here.

The Supreme Court of Florida was called upon to determine what constituted "consideration" within the purview of Section 201.02, F.S. This is clear from the court's opinion (Appended to Petitioner's brief as Appendix A, App. 3) which stated:

> "The question before us is whether 'consideration' for the purpose of measuring the amount of documentary tax due under Florida Statutes §201.02 includes the value of an outstanding mortgage on the property, which mortgage is not expressly assumed by the buyer, although the property is sold subject to the mortgage. We agree with the contention of respondents herein that the clear purpose of Florida Statutes §201.02 is to place a documentary stamp tax on the total consideration involved in a transfer of real property and that this amount includes any outstanding mortgages."

The construction of the Florida documentary stamp tax statute was purely a question of state law. As this Court said in Herb v. Pitcairn, 324 U.S. 117, 125-126 (1945):

> "Third. This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. Murdock v. Memphis, 20 Wall. (US) 590, 636,

22 L ed 429, 444; Berea College v. Kentucky, 211 US 45, 53, 53 L ed 81, 85, 29 S Ct 33; Enterprise Irrig. Dist. v. Farmers Mut. Canal Co. 243 US 157, 164, 61 L ed 644, 648, 37 S Ct 318; Fox Film Corp. v. Muller, 296 US 207, 80 L ed 158, 56 S Ct 183. The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and Federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions."

Although Petitioner makes mention of the fact that Florida Attorney Generals' Opinions (Appended to Petitioner's brief as Appendices E, App. 15-16 and F, App. 17-20) were in effect for 30 years, it fails to mention that Attorney General's Opinion 061-77 (Appendix G, App. 21-27) was rendered seven years before the transaction involved here. Petitioner was clearly aware of the changes in the application of Section 201.02, F.S.

Respondents contended in the Court below that there were sound factual and legal reasons to find that the Petitioner herein had included the value of the outstanding mortgages as "consideration".

This was partly based on the fact that the agreement between the parties clearly contemplated that the buyer would make all mortgage payments after "closing" whether legally bound to or not.

As the Florida Supreme Court said (Appendix A, App. 4):

> "In the instant case, the concept of 'consideration' as used in Florida Statutes §201.02 is clearly satisfied. The Sale and Purchase Agreement of the parties dated April 26, 1968, contemplates a transfer of the burden of making the mortgage payments to the grantee as of the date of closing and a corresponding benefit derived by the grantor who agreed to make mortgage payments only up until the time of closing, including June 1, 1968. The Stipulation of the parties filed in this Court states that the grantee of the property had, in fact, made all mortgage payments since the closing date. This arrangement constitutes a part of the consideration for the transfer of the property. Any other view of the situation is unrealistic." (Emphasis supplied)

No matter how skillfully Petitioner endeavors to create a federal question in the case at bar, the fact remains that none exists. As this Court stated in

Wilson v. North Carolina, 169 U.S. 586, 593-595 (1898):

> "Upon this subject it was said, in the case of Allen v. Georgia, 166 U.S. 138, 140, as follows: 'To justify any interference upon our part it is necessary to show that the course pursued has deprived, or will deprive, the plaintiff in error of his life, liberty or property without due process of law. Without attempting to define exactly in what due process of law consists, it is sufficient to say that, if the Supreme Court of a State had acted in consonance with the constitutional laws of a State and its own procedure, it could only be in very exceptional circumstances that this court would feel justified in saying that there had been a failure of due legal process. We might ourselves have pursued a different course in this case, but that is not the test. The plaintiff in error must have been deprived of one of those fundamental rights, the observance of which is indispensable to the liberty of the citizen, to justify our interference.'
>
> * * * *
>
> "Upon the case made by the plaintiff in error, the Federal question which he attempts to raise is so

> unfounded in substance that we are justified in saying that it does not really exist; that there is no fair color for claiming that his rights under the Federal Constitution have been violated, either by depriving him of his property without due process of law or by denying him the equal protection of the laws.
>
> "In Hamblin v. Western Land Company, 147 U. S. 531, it was stated that 'a real, and not a fictitious, Federal question is essential to the jurisdiction of this court over the judgments of state courts. Milligar v. Hartupee, 6 Wall. 258; New Orleans v. New Orleans Water Works Co., 142 U. S. 79, 87. In the latter case it was said that "the bare averment of a Federal question is not in all cases sufficient. It must not be wholly without foundation. There must be at least color of ground for such averment, otherwise a Federal question might be set up in almost any case, and the jurisdiction of this court invoked simply for the purpose of delay."'"

The Wilson case has not been overruled and the reasoning of that case is clearly applicable in the case sub judice.

ISSUE II

WHETHER AN ALLEGED FEDERAL QUESTION WHICH WAS NOT RAISED UNTIL PETITION FOR REHEARING IN THE STATE SUPREME COURT IS A PROPER SUBJECT FOR REVIEW BY THIS COURT.

Respondents respectfully submit that the "Federal Questions" alleged by Petitioner were completely overlooked until its Petition for Rehearing in the Florida Supreme Court. The questions of due process and equal protection were never briefed or raised in oral argument. Petitioner all but admits this when it states that the equal protection and due process arguments were "inherently involved" in its original application for mandamus (see Page 8 of Petitioner's Brief).

Respondents submit that Petitioner raised no federal question prior to rehearing in the Florida Supreme Court and is therefore precluded from review by this Court. As this Court said in Hanson v. Denckla, 357 U.S. 235, 243-245 (1958):

> ". . . We need not determine whether Florida was bound to give full faith and credit to the decree of the Delaware Chancellor since the question was not seasonably presented to the Florida court. Radio Station WOW v.

Johnson, 326 U.S. 120, 128, 89 L Ed 2092, 2099, 65 S.Ct. 1475."

Further authority is found in the case of Radio Station WOW v. Johnson, 326 U.S. 120, 128 (1945), where this Court said:

> ". . . Questions first presented to the highest State court on a petition for rehearing come too late for consideration here, unless the State court exerted its jurisdiction in such a way that the case could have been brought here had the questions been raised prior to the original disposition (citations omitted)."

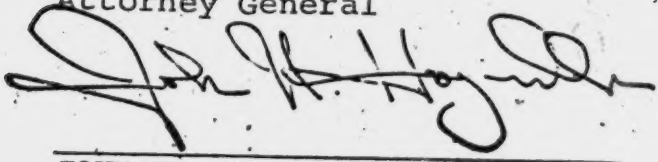
Thus, Respondents content that even if a Federal question is in fact raised in this instance, it was not raised in a proper manner in the court below.

CONCLUSION

No adequate grounds exist to invoke the jurisdiction of this Court since no Federal question exists. This case was resolved by the Florida Supreme Court purely within the framework of existing state law and the Federal questions sought to be reviewed here were never raised until Petition for Rehearing.

Respectfully submitted,

ROBERT L. SHEVIN
Attorney General



JOHN N. HOGENMULLER
Assistant Attorney General

WINIFRED L. WENTWORTH
Assistant Attorney General

Counsel for Respondents

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FLORIDA 32304

PROOF OF SERVICE

This is to certify that I, Winifred L. Wentworth, one of the attorneys for the Respondents herein, and a member of the Bar of the Supreme Court of the United States, on the 18th day of August, 1971, serve a copy of the foregoing Response to Petition for Writ of Certiorari on the Petitioner by mailing a true and correct copy in a duly addressed envelope with first-class postage affixed, to its counsel, Ralph H. Bearden, Jr., Attorney, P.A., 648 S.W. 12 Avenue, Miami, Florida 33130.

WINIFRED L. WENTWORTH
Assistant Attorney General

70-3231

Supreme Court, U.S.
FILED
SEP 30 1971
ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

~~NO. 1848~~ 70-303

KENDALL HOUSE APARTMENTS, INC.,
a Florida Corporation,

Petitioner,

vs.

THE DEPARTMENT OF REVENUE, an agency
of the State of Florida, et al,

Respondents.

REPLY BRIEF OF PETITIONER

RALPH H. BEARDEN, JR.,
ATTORNEY, P.A.
648 S. W. 12 Avenue
Miami, Florida 33130
Attorney for Petitioner

TOPICAL INDEX

	Page
RESPONDENT'S OBJECTION TO JURISDICTION	1
RESPONDENT'S STATEMENT OF THE CASE	1
ARGUMENT	2-7
CONCLUSION	7-9
PROOF OF SERVICE	9
APPENDIX H	1-6

TABLE OF CITATIONS

De Vore v. Lee (Fla. 1947) 30 So.2d 924 at 927	3

OTHER AUTHORITIES

Florida Statutes Annotated Section 201.02	4,5
Federal Statute (26 USC, Section 4361)	4
U.S. Supreme Court Rule 19(1) (a), 28 U5	5

REPLY BRIEF OF PETITIONER

The petitioner files this, its Reply Brief addressed to arguments first raised in respondent's brief in opposition, as permitted by Rule 24(4).

RESPONDENT'S OBJECTION TO JURISDICTION

Respondent contends (I) that the decision of the Florida Supreme Court is entirely consistent with applicable state law, (II) that no substantial federal question has been raised, and (III) that the federal question was not timely raised.

RESPONDENT'S STATEMENT OF THE CASE

Respondent concedes that petitioner's statement of the case is "substantially accurate", but respondents restate the same in a manner calculated to minimize or obviate the federal question.

Respondent does not deny that the tax was assessed without a hearing, based upon a conclusive presumption which the taxpayer was not allowed to repel.

It is not disputed that the Supreme Court of Florida, in discharging the alternative writ, has held, in effect, that the amount

of the "subject to" mortgage will be conclusively presumed to be consideration for the conveyance. Respondent refers to the stipulation of the parties which was before the Florida Supreme Court. Since that stipulation has not yet been made a part of the Appendix by either party, petitioner adds it to this brief as petitioner's Appendix "I", in order that it will be before the Court for such consideration as the Court finds proper.

Please note that it is in two parts, the second part being styled "Supplementary Stipulation". The exhibits to the stipulation are not being attached for the reasons that they are correctly summarized in the stipulation itself and their inclusion herein would make this brief unnecessarily long since they include voluminous matter not germane to this inquiry.

ARGUMENT

I

Respondents contend that the decision sub judice is "entirely consistent with applicable state law".

Petitioners insist that before the decision complained of, it was the law of the state that taxable considerations would not be determined by speculation.

The stipulation clearly reflects (Page 1 of Supplementary Stipulation) that the buyers specifically contracted against liability under the existing mortgage, and petitioner alone was liable in case of deficiency after foreclosure. That the buyers in fact paid installments on the mortgage after the sale the sale does not alter the fact that they were not legally bound to do so, and they obviously did so only to protect their "equity." Should they refuse to make the payments when due, for whatever reason, the petitioner alone would be responsible. It is therefore speculative, to say the least, to treat the full amount of the mortgage as taxable "consideration" just as if the buyers had assumed or paid it so as to relieve the petitioner entirely of his liability.

This is the point which respondent ignores in its brief, just as it was ignored by the Supreme Court of Florida. Yet, before this case, it was the settled law in that state, as it had held in De Vore v. Lee (Fla. 1947) 30 So.2d 924 at 927:

> "When taxes are to be levied according to a monetary consideration, the law contemplates that such tax should be confined to considerations which have a reasonably determinable pecuniary value. The sole considerations passing to the lessors for the

leases were executory promises for executory considerations. Such leases were not taxable under Sec. 201.02, F.S.A. and F.S. 1941.

We respectfully urge that the decision sub judice was not "entirely consistent with applicable state law" as respondents contend.

II

Respondents insist that there is no substantial federal question raised.

In answer to this contention, petitioner points out that a tax has been assessed against petitioner arbitrarily based on speculation, and petitioner has not been afforded a hearing on the amount of the tax prior to its assessment, imposition and collection (Page 4, Appendix to Petition).

Further, the question of taxable consideration was conclusively presumed against petitioner, with no opportunity to repel the presumption.

Respondents do not directly dispute these contentions of petitioner but seek to excuse them on the contention that the statute authorizing the tax differs from the Federal Statute (26 USC, Section 4361) from which respondents suggest was patterned in that the federal act expressly excluded the value of mortgages when it placed the tax on the consideration for the conveyance.

Respondents do not contend, however, and cannot contend that the Legislature by its enactment of Section 201.02, Florida Statutes, intended to include as taxable consideration the amount of a mortgage which was not assumed.

The arbitrary and speculative treatment of an unassumed mortgage in the full amount thereof as taxable consideration is clearly a denial of that due process guaranteed by the Federal Constitution. The decision of the Supreme Court of Florida has therefore passed upon a federal question of substance.

Application of this particular tax in such a manner does not appear to have been reviewed by the Supreme Court of the United States prior to this time, although the constitutional position taken by petitioner appears to have been uniformly protected in the prior decisions of this Court.

Certainly, the decision of the Supreme Court of Florida has been made "in a way probably not in accord with applicable decisions of this Court, within the purview of U.S. Supreme Court Rule 19(1) (a), 28 USCA.

III

Respondents contend that the federal question was not raised until petition for rehearing.

Actually, the question of due process raised herein was part and parcel of the controversy from its inception. Under Florida law, its Supreme Court had original jurisdiction, and the question presented to it was simply stated, whether the state taxing authority could treat as taxable consideration an unassumed mortgage.

The Supreme Court in effect has ruled that such a mortgage is conclusively presumed consideration. Such a ruling violates the due process clause, and since it also is a departure from existing state law it denies equal protection. The first opportunity of petitioner to raise the question of the denial of federal constitutional rights by the state court ruling was on the petition for rehearing, and the Florida Supreme Court was clearly asked to reconsider its ruling on constitutional grounds, which it declined to do. Therefore, the federal question was clearly presented and ruled upon in the court of first and last resort.

Since the Supreme Court of Florida had original jurisdiction, petitioner presumed it would follow existing state law and correctly apply the decision of the United States Supreme Court with regard to due process and equal protection. When it did not do so, and instead conclusively presumed the question of consideration, contrary to the stipulated evidence, then the only opportunity afforded

petitioner to seek redress on the federal questions thus raised was by means of petition for rehearing. Under these circumstances, we submit, it is a farce to contend that petitioner did not seasonably raise the federal question.

The cases cited by respondents' brief all involve instances where the federal question was not raised in the Court having original jurisdiction and are, we submit, inapplicable.

CONCLUSION

The jurisdiction of this Court is properly invoked where it is shown that the Supreme Court of Florida, in a case of original jurisdiction, "has decided a federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court."

If the decision sub judice is allowed to stand as authority for the imposition by the state of a tax based on a presumed consideration, measured by speculation, and without opportunity to the taxpayer to repel the presumption, then we are in peril.

The pressure on local and state officials for new sources of revenue will virtually insure taxation on the transfers

of other types of property, based on its speculative value.

The question here involved, therefore, is indeed one of great substance, far transcending the monetary amount of the tax presently involved.

The mortgage in question was taxed as part of the consideration for the original purchase of the property by the petitioner. The question of whether such an outstanding encumbrance can be taxed as consideration for a subsequent conveyance by the petitioner when his buyer expressly contracts against assuming the encumbrance, is a novel one before this Court. Moreover, the Florida court decided the question by conclusively presuming such encumbrance as part of the consideration and this decision is contrary to the due process and equal protection provisions of the Federal Constitution and applicable decisions of this Court with regard to those guaranties.

We respectfully submit that this case meets the criteria of U.S. Supreme Court Rule 19, and the Writ of Certiorari should

be granted as prayed.

Respectfully submitted,

RALPH H. BEARDEN, JR.,
ATTORNEY, P.A.
Attorney for Petitioner

By RALPH H. BEARDEN, JR.
648 S. W. 12 Avenue
Miami, Florida 33130
Telephone: 371-5539

PROOF OF SERVICE

THIS IS TO CERTIFY that I, Ralph H. Bearden, Jr., one of the attorneys for the petitioner herein and a member of the Bar of the Supreme Court of the United States, on the 28th day of September, 1971, served true and correct copies of the foregoing Reply Brief of Petitioner on the respondents by depositing the same in the United States mail in an envelope duly addressed to Robert L. Shevin, Attorney General, State of Florida, with first-class postage affixed.

RALPH H. BEARDEN, JR.,
ATTORNEY, P.A.

By RALPH H. BEARDEN, JR.

STIPULATION

(Style of Case Omitted)

IT IS HEREBY stipulated and agreed by and between counsel for the respective parties herein as follows:

KENDALL HOUSE APARTMENTS, INC., (hereinafter referred to as the seller) is engaged in the business of selling and leasing real estate in the State of Florida.

On may 29, 1968, the seller transferred by two warranty deeds certain real property located in Dade County, Florida, to Clinton H. Churchill and Clinton D. Churchill of 1420 Main Street, Buffalo, New York. The said Warranty Deeds were recorded in Official Record Book 5967, pages 547/9, and the property involved in each instrument was subject to a prior and separate mortgage. Although the transactions involving the two deeds were somewhat intertwined and handled simultaneously, only the deed of one of these transactions concerns the parties to the stipulation at this time (see attached copy of that instrument labeled Exhibit "A").

The property to which the deed in question pertained and which was described therein was, at the time of sale and recording of the deed, subject to a mortgage in the amount of $493,705.68 payable to Life Insurance Company of Virginia. According to the "Closing Statement" (copy attached as Exhibit "B"), the sole and total consideration from the buyer for the property covered in both instruments was a payment of $650,000. This does not, however, take into consideration the fact that both pieces of property were still subject to the encumbrances of a mortgage.

The seller has agreed from the origin of the transaction that it would pay any and all recording fees and stamp taxes. Therefore, the present discussion involving a dispute as to payment of documentary stamp taxes concerns only the seller (who has assumed any tax liability that exists) and the question of its liability to the state agency known as the Department of Revenue (hereinafter referred to as the State).

It is admitted by both of the undersigned parties that the taxes on both deeds have been paid to the extent of the $650,000 consideration. The State claimed that a balance of $1,481.40 in regular documentary stamp taxes, pursuant to Section 201.02, Florida Statutes, remained owing on the deed in question after that deed was recorded. The State's claim was based on the fact that the mortgage of $493,705.68 was outstanding and was either expressly or impliedly assumed by the buyer and in and of itself constituted consideration. If said tax is proper, it is derived from the provisions of Sections 201.02, Florida Statutes. The State did not claim that any additional surtax was owed, in light of Section 201.021, Florida Statutes, which specifically exempts existing mortgages when determining consideration for surtax purposes.

In response to the assessment by the State, the seller paid the tax under protest on April 24, 1969, mailing check #2401, drawn on Pan American Bank of Miami, Miami, Florida,

and signed by Richard J. Tugg in the amount of $1,481.40; see attached letter of acknowledgment along with statement of May 5, 1969, by the State (labeled Exhibit "C"); see also attached letter of acknowledgment along with a corrected statement of July 3, 1969, by the State (labeled Exhibit "D"). It is emphasized that the tax was paid only as to the Warranty Deed in question; not as to the other one not specifically at issue here. A Requisition for Refund was submitted by the seller on or about June 30, 1969 (see attached copy labeled Exhibit "E"); said Requisition was formally denied by the State's letter of July 10, 1969, a copy of which is attached (Exhibit "F").

It is further agreed by the undersigned parties that the other deed transaction, which occurred simultaneously with the one at issue, and in regard to which no taxes have been collected, will be subject to and finally controlled by the final decision made by the Supreme Court of Florida in an original mandamus proceeding to be brought in said Court by the seller, respecting his claim for a refund of taxes paid on the instrument in question and it is also agreed that the State shall act promptly upon the handling of both collection and the claim for refund after such final decision in the same manner as if both had been included in such mandamus proceedings without the necessity of either party taking any further action respecting such claims or refund.

/s/ Ralph H. Bearden
Attorney for Kendall House

/s/ W. O. Beauchamp, Jr.
Assistant Attorney General
Attorneys for State Department of Revenue

/s/ John Moriarty
General Counsel
Department of Revenue

SUPPLEMENTARY STIPULATION

(Style of Case Omitted)

IT IS HEREBY further stipulated and agreed by and between counsel for the respective parties herein as follows:

The mortgage on the real property in question was not assumed by the purchaser and the purchaser acquired title to the realty subject to that mortgage but without any obligation to pay said mortgage, as evidenced by the contract between the plaintiff seller and said purchaser (see attached copy of that contract marked Exhibit "F").

The question of assumption of the mortgage was negotiated strenuously between the plaintiff seller and the purchaser, the purchaser refused to assume the same, and seller agreed to pay all recording fees and stamp taxes incident to the sale.

By the terms of the sale, and the provisions of the deed, buyer can abandon the property without liability for the mortgage and the note secured thereby. In such event the seller alone is responsible to the holde of the note and mortgage, who can foreclose his mortgage and sue seller only for any deficiency or elect to hold seller only liable on the note without foreclosure of the mortgage.

The mortgagee, Life Insurance Company of Virginia, agreed and consented to the sale of said realty by the plaintiff seller

to the purchaser without the purchaser assuming the mortgage, and said mortgagee continued to hold plaintiff as the original mortgagor, liable on the indebtedness secured by said mortgage (see letter of Life Insurance Company of Virginia attached as Exhibit "G").

When the said mortgage held by Life Insurance Company of Virginia was first taken and recorded, tax levied under Section 201.02 was paid on the note evidencing the debt secured thereby, and documentary stamps evidencing the payment of the same were affixed to said mortgage note at the time of recording. (see Exhibit "H" attached).

Plaintiff paid the instant tax only at the insistance of the buyers through their attorney (see Exhibit "I" attached) and in compliance with plaintiff's contract to pay and all recording fees and stamp taxes. Even then, plaintiff paid the same under protest, and requested a refund thereof which was denied by defendants as set out in more detail in the first Stipulation made herein.

Although the parties stipulate that the States' Claim was based on the fact that the mortgage of $493,705.68 was outstanding and that it is the States' contention that said mortgage was either expressly or impliedly assumed by the buyers and therefore in and of itself constituted consideration, it is

further stipulated that said mortgage was not in fact assumed, but rather that the realty was sold subject to it, and it is therefore contended by plaintiff that the subject-to mortgage did not constitute taxable consideration.

/s/ Ralph H. Bearden, Jr.
Attorney for Kendall House Apartments, Inc.

/s/ W. O. Beauchamp, Jr.
Assistant Attorney General
Attorneys for State Department of Revenue

/s/ John Moriarty
General Counsel
Department of Revenue